

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:FSH:MAN:TL-N-4903-00

JJSweeney

date:

to: Director of Field Operations, Financial Services and Healthcare  
Unit

Attn: William Mirabello, LMSB, Team 1105

from: Area Counsel (CC:LM:FSH:MAN)

subject: Taxpayer: [REDACTED] (U.I.L. #6501.08-10)  
EIN: [REDACTED]  
Taxable Year: [REDACTED] (Forms 1120F, 940 and 941)

PROPER PARTY TO SIGN CONSENT FORMS ON ASSESSMENT AFTER MERGERS  
AND NAME CHANGES

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This memorandum responds to your request of August 17, 2000, for written advice concerning the appropriate language for the name line for a Form 872, Consent to Extend the Statute of Limitations on Assessment, ("Form 872") and for a Form SS-10, Consent to Extend the Time to Assess Employment Taxes, in connection with the [REDACTED] taxable year of [REDACTED] (known in [REDACTED] as [REDACTED].)

We include herein the language for these forms and include language for other forms we believe should be executed by [REDACTED], a potential transferee of the assets of [REDACTED] due to the merger of [REDACTED] and [REDACTED].

### Facts

During [REDACTED], [REDACTED] was registered as a limited company in [REDACTED]. Under [REDACTED] law, [REDACTED] was authorized as a financial corporation. Its business activities included corporate banking, investment banking, and financing activities. [REDACTED] operated its businesses in several countries. Its parent company was [REDACTED] ("[REDACTED]"), which in [REDACTED] owned approximately [REDACTED]% of [REDACTED]'s stock. [REDACTED] was also the parent of several other corporations with financial service businesses.

In [REDACTED], among other years, [REDACTED] was licensed to conduct banking activities within the United States and did so through various branch offices. To report these activities for U.S. income tax purposes, [REDACTED] filed a Form 1120F, Federal Income Tax Return of a Foreign Corporation, ("Form 1120F") for its [REDACTED] tax year. Being a foreign corporation, [REDACTED] was not part of a consolidated return group. Also for [REDACTED], [REDACTED] filed a Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return and Forms 941, Employer's Quarterly Federal Tax Return, in connection with employees who worked for its U.S. operations.

In [REDACTED], a reorganization of various companies under [REDACTED]'s control was approved by the shareholders of [REDACTED]. As part of this reorganization, [REDACTED] and certain subsidiaries were merged into [REDACTED] under [REDACTED] law. [REDACTED] emerged as the survivor in this merger, and, as part of the reorganization, changed its name to [REDACTED].

Subsequently, on [REDACTED], [REDACTED] and [REDACTED] ("[REDACTED]"), another banking organization registered as a limited company in [REDACTED], purportedly executed a Merger Agreement under the laws of [REDACTED]<sup>1</sup> ("the agreement"). This merger culminated from several transactions in which [REDACTED] acquired all of the common stock of [REDACTED]. In this merger, [REDACTED] emerged as the surviving corporation, and [REDACTED] was dissolved. Upon the merger, [REDACTED] changed its name to "[REDACTED]". The agreement noted that the merger was to be given retroactive effect to [REDACTED].

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<sup>1</sup> We reviewed an unexecuted version of the agreement. For purposes of this memorandum, we assume that this agreement was executed on [REDACTED], the date identified thereon. We recommend that you verify that the agreement we reviewed was in fact executed by the applicable parties.

The agreement covered the disposition of [REDACTED]'s assets and most, if not all, of its liabilities that existed as of [REDACTED]. The agreement stated that under Article 372-1 of the Companies Act of July 24, 1966, [REDACTED] transferred all of its worldwide assets and liabilities to [REDACTED]. These assets and liabilities were specifically to include (among others) those in countries where [REDACTED] conducted operations through branches, agencies and representative offices. The assets and liabilities transferred to [REDACTED] were outlined in a balance sheet of [REDACTED] of [REDACTED] that was incorporated into the agreement. The agreement specified that [REDACTED] would assume other liabilities, such as off-balance sheet commitments, borne by [REDACTED] even if they had been omitted from this balance sheet.

During the year [REDACTED] but before the date of the merger agreement, [REDACTED] transferred some of its assets and obligations to three of its wholly-owned subsidiaries. These transactions were described briefly in paragraph 1(c)(vi) of the agreement. According to that paragraph, these transactions were to be given retroactive effect to [REDACTED] and would be deemed to have been borne by and carried out on [REDACTED]'s behalf.

You are examining for the [REDACTED] year the Form 1120F, Form 940 and Forms 941 of the entity then known as [REDACTED]. You indicate that each of these above-referenced forms for the taxable year [REDACTED] remain open for assessment. The assessment period for the Form 1120F and Forms 941 currently expires on [REDACTED]. The assessment period for the Form 940 currently expires on [REDACTED].

To continue this examination, you seek to extend the periods for assessment for the above-referenced returns. In this connection, the issue is which entity should execute the applicable consent forms for [REDACTED]'s [REDACTED] tax year. It must then be determined how such entity should be described on the "name" lines of the consent forms.

#### Law and Analysis

As the statute of limitations on assessment for the Form 1120F has yet to expire for [REDACTED]'s [REDACTED] year, a Form 872 can be executed to extend the statute of limitations on assessment for that return. I.R.C. § 6501(c)(4). As the statute of limitations on assessment for the Form 940 and Forms 941 has yet to expire, a Form SS-10 can be executed to extend the statute of limitations on assessment for those returns as well. Under the merger agreement, the separate corporate existence of [REDACTED] (then known as [REDACTED]) ceased, as [REDACTED] (whose name was then changed to [REDACTED]) was the surviving entity. The

capacity in which [REDACTED] is eligible to execute the consent must next be considered.

[REDACTED] can execute the 872 and SS-10 consent forms on behalf of [REDACTED] if it is primarily liable as a successor in interest for the pre-merger debts of [REDACTED]. See, Southern Pacific Transportation Company v. Commissioner, 84 T.C. 367 (1985). Such liability is, for a domestic corporation, established under state law. If [REDACTED] liability is limited to that of a transferee of [REDACTED] assets, however, it must execute the consents as a transferee under I.R.C. § 6901. The consent form for assessing income taxes against a transferee is Form 977. The consent form for assessing employment taxes against a transferee is Form 4016.

We cannot with absolute certainty determine, based on either our review of the merger agreement or [REDACTED] company law, whether [REDACTED] is primarily liable for the debts of [REDACTED] as its successor in interest or whether [REDACTED] is instead a transferee of [REDACTED] under I.R.C. § 6901<sup>2</sup>. The merger agreement uses the terms "transfer" and "assumption" interchangeably when describing [REDACTED] obligation for the debts of [REDACTED]. Although the agreement references [REDACTED] law that presumably governs the merger, our review of such law reveals no information from which we can definitely conclude on this issue<sup>3</sup>. Accordingly, we recommend that you request [REDACTED] to execute consent forms applicable to transferees to cover both income taxes and employment taxes. We further recommend that you also request for [REDACTED] to execute the consent forms that apply if it was [REDACTED] successor in interest (i.e., Forms 872 and SS-10).

The language for the name line on the Form 872 and Form SS-10 should be "[REDACTED] ([REDACTED]), formerly known as [REDACTED] ([REDACTED]), successor-in-interest to [REDACTED] by merger ([REDACTED]), formerly known as [REDACTED] ([REDACTED])." The language for naming [REDACTED] on the Form 977 and Form 4016 should be "[REDACTED] ([REDACTED]), formerly known

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<sup>2</sup>A entity could in fact qualify as both in certain cases. Turnbull, 373 F.2d at 91. We cannot conclude that such is the case here, however.

<sup>3</sup>Article 381 of [REDACTED] company law states that a joint stock company that survives a merger shall be the debtor for the non-bondholder debtors of the merged company. This section further states, however, that such substitution shall not result in a novation. Note that this section is made applicable to limited companies under Article 388 of such law.

as [REDACTED] ([REDACTED]), a transferee of [REDACTED], formerly known as [REDACTED]." A principal officer of [REDACTED] should execute this form and the Form 872.

Moreover, we further recommend that a principal officer of [REDACTED] execute a Transferee Agreement, Form 2045, to secure [REDACTED] agreement that it is a transferee of [REDACTED] for I.R.C. § 6901 purposes. [REDACTED]'s execution of this agreement should constitute an admission that it qualifies as [REDACTED] transferee. See, *Turnbull, Inc. v. Commissioner*, 373 F.2d 91 (5<sup>th</sup> Cir. 1967), cert. denied, 389 U.S. 842 (1967). Securing this agreement is important as under I.R.C. § 6902 the Service bears the burden to show that an entity qualifies as a transferee. The transferor line of this agreement should say "[REDACTED], formerly known as [REDACTED]." The transferee line should say "[REDACTED], formerly known as [REDACTED]." Note that the Form 2045 language does not refer to employment taxes. Thus, you should, after the words "profits taxes" in the third line of the first paragraph, insert the words "or Federal employment taxes."<sup>4</sup> The rest of this Form should be completed.

If you have not yet done so, we recommend that you verify the EINs of the respective corporations to be shown on all of these Forms. If any change(s) in EINs occurred as a result of the transactions discussed herein, such change(s) should be reflected on the forms.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document these actions.

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<sup>4</sup> Note that it is possible that [REDACTED] might not be held liable as a transferee for [REDACTED] employment taxes. I.R.C. § 6901(a)(2) states that for Title 26 taxes other than those imposed under Subtitles A and B (income, estate or gifts taxes), transferee liability arises only upon the liquidation of a partnership or corporation or upon an I.R.C. § 368(a) reorganization. Whether either of those events occurred is uncertain. This uncertainly underscores the importance of executing the Form SS-10 as well.

We further recommend that you pay strict attention to the rules set forth in the IRM that cover how to prepare and execute a Form 872. IRM 4541.1(2) requires use of Letter 907(DO) to solicit the Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

For preparing and executing the Form SS-10, substantially similar procedures to those referenced above for Forms 872 are contained in the Employment Tax Handbook, Handbook 104.6. We recommend that you review these procedures before submitting the Form SS-10 to the taxpayer for execution.

If you have any questions concerning the advice provided in this memorandum, please contact John Sweeney at (212) 264-1595, ext. 263.

ROLAND BARRAL  
Area Counsel

By: \_\_\_\_\_

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